

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4001

UNITED STATES COURT of APPEALS FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SCIENTIFIC PEST CONTROL CORPORATION; LOCAL 522,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

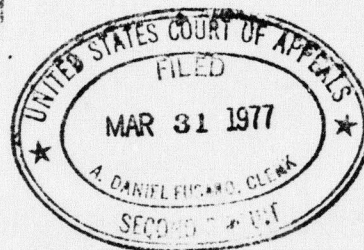
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JOHN H. FERGUSON,
MORTON HAMROW,

Attorneys,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.



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STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee William Raupp and then, after reinstating him, by reducing his pay, eliminating certain benefits, and curtailing his work schedule.

2. Whether substantial evidence on the record as a whole supports the Board's finding that Local 155 represented an uncoerced majority of the employees and that the Company therefore violated Section 8(a)(5) and (1)

of the Act by both refusing to bargain with Local 155 and engaging in misconduct which prevented the holding of a fair election.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Sections 8(a)(1), (2), and (3) of the Act by recognizing Teamsters Local 522 as the collective bargaining representative of its employees at a time when that union did not represent an uncoerced majority of its employees and by thereafter entering into and enforcing a collective bargaining contract with Teamsters Local 522; whether substantial evidence on the record as a whole supports the Board's finding that Teamster Local 522 violated Section 8(1)(A) and (2) of the Act by accepting recognition as the collective bargaining representative of the Company's employees and further by entering into and enforcing a collective bargaining contract with the Company.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order against Scientific Pest Control Corporation (herein "the Company and Local 522, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "Teamsters Local 522") issued on June 23, 1976 and is reported at 224 NLRB No. 212 (A. 249-290)^{1/}. This Court has

^{1/} "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

jurisdiction over the proceedings, the unfair labor practices having occurred in St. James and Port Washington, New York, where the Company is engaged in providing and performing insect and pest extermination and fumigation services for customers.

I. THE BOARD'S FINDINGS OF FACT

- A. Background: a disfavored union achieves a majority of signed authorization cards; the Company responds to this organizational campaign by engaging in various coercive acts, including the discharge of employee Raupp

The Company is a closed corporation with Salvatore Giordano and his wife, each owning 50 percent of the stock (A. 366; 40). The Company's principal place of business is located in St. James, Suffolk County, New York, and it has an additional location at Port Washington, Nassau County, New York, some 30 miles away (A. 366; 52, 61, 79).

On September 4, 1974,^{2/} an organizational campaign was begun among the Company's employees by Exterminators, Fumigators and Termite Workers, Local 155, Service Employees International Union, AFL-CIO (herein "Local 155"). Ernest Lombardi, Local 155's organizer and secretary-treasurer, contacted employee Mike Passintino and Anthony Nuzzi to inquire if they were interested in organizing the Company; the two employees responded affirmatively, were apprised of organizing procedure, and signed Local 155 authorization cards (A. 367; 19-20, 100, 106, 312).

On September 5, Passintino and Nuzzi told employee William Raupp

2/ All dates hereafter are in 1974 unless otherwise specified.

about their meeting with Lombardi. Raupp signed a Local 155 authorization card and agreed to act as inside organizer. By September 8, primarily through Raupp's efforts, nine of 15 eligible bargaining unit employees had executed authorization cards designating Local 155 as their representative for collective bargaining purposes (A. 367; 415, 7-8, 100-102, 44-45, 106, 184, 414).

On September 7, Giordano confronted employee Thomas Clifford and asked him whether he had heard anything about union activity or anyone trying to bring in a union (A. 353; 172-173). Clifford who had signed a Local 155 card two days earlier (A. 414), denied knowledge of any union activity. Giordano asked Clifford to let him know if he heard anything (A. 343; 173). Later that day, Giordano again stopped Clifford, advised him that he knew men were attempting to start a union and he asked him to explain why (A. 353; 175). Clifford responded that the employees needed more money and wanted increased benefits (A. 353; 175). Giordano then declared that all they had to do was approach him with their requests (A. 353; 175-176). Clifford countered that employee Raupp had done so on a number of occasions and had been put off by Giordano with comments that he could do nothing and the employees would just have to wait (A. 353; 175). Giordano then warned that if the employees joined a union he would fire the entire staff and just keep the supervisors and conduct his business from his home.

On the same day, September 7, Giordano summoned Raupp to his basement office where he asked Raupp what the story was with his union

(A. 353; 104). Raupp replied that the employees were bringing in a union in the hopes of obtaining improved benefits and wages (A. 353; 105). Giordano explained that he had only himself to worry about, that he did not blame the employees for going to the union, and that he, Giordano, would probably do the same thing in a similar situation. Giordano went on to tell Raupp that the employees could always quit and find another job. Raupp replied that he liked the work. Thereupon, Giordano advised Raupp that he was fired and that this action would prevent him from attending a local university at night to receive specialized training at the Company's expense, as had been planned. To emphasize the point, Giordano removed the university application form and a tuition check from Raupp's personnel file and tore them up. Giordano then cautioned Raupp that he would most likely blacklist him with all exterminating firms and he probably would never get another exterminator's job. Giordano also threatened to close the shop to eliminate all regular customers and employees, and to operate the business out of his basement, using a three-man skeleton crew (A. 354; 105). He asked Raupp who had brought in the Union and Raupp replied that the Union had contacted the men and that he was the inside organizer who had spoken to most of the employees. Giordano then asked Raupp whether if he had any Local 155 authorization cards. When Raupp displayed the cards he had, Giordano snatched them away and put them in his pocket (A. 354; 106). Giordano thereupon directed Raupp to empty the chemicals and equipment from his car, adding that if Raupp would clear up the union activity, he could have his job back (A. 354; 106, 109).

After Raupp left, he called Local 155 Secretary-Treasurer Lombardi and arranged to meet with him later the same day (A. 354; 106-107). Raupp told Lombardi what had transpired with Giordano and said that one of the office clericals had informed him that employee Vollano had told Giordano about the union activities.

Lombardi immediately scheduled a meeting for the following day, Sunday, September 8 (A. 354; 23, 107). At this meeting, Local 155 literature was passed out and one additional employee, Patrick Tierney, signed a card, and a second employee, Dennis Balz, turned in a card which he had signed the previous day (A. 354, 355, 356; 24, 45, 72, 73, 414). Lombardi sought to assure the employees about Raupp's discharge and those attending the session agreed to meet with Lombardi at the Company property the next morning prior to going to work so that Lombardi could speak with Giordano about the matter (A. 354; 46, 54-55, 107).

On Monday, September 9, the employees gathered with Lombardi outside the Company's premises (A. 356; 29, 30-31, 54-55). When Giordano arrived, Lombardi told him that one of the reasons he was there was the unlawful termination of Raupp (A. 356; 26, 46, 54, 55, 164-165, 167, 253, 254). Giordano escorted Lombardi to his office, where Lombardi announced that Local 155 had a majority of employees signed up and that they had authorized that union to represent them (A. 356; 25, 29, 253). After an exchange regarding a card check, Giordano stated that if the union got in it was going to be pretty hard for him, and he would have to close up the place and get rid of the dead wood (A. 356; 25). Giordano then told

Lombardi to have Patrick Carroll, the president of Local 155, call him and they would set up a tentative date and see what they could work out (A. 356-357; 25, 32-33). The meeting terminated with Lombardi asking once again that Raupp be put back to work. Giordano said that Raupp already was back to work (A. 357; 25-26, 29, 254).

That day, Giordano asked four or five of his employees why they wanted to join the union (A. 354; 55-56, 165-166, 255). After the employees had been asked whether they wanted the union, Giordano stated he would fix that -- the union would never get into his shop (A. 355; 56, 167).

- B. Instead of recognizing Local 155's written claims and requests for bargaining, the Company recognizes and signs a collective bargaining contract with Teamsters Local 522 as a condition of employees' continued employment pursuant to the collective bargaining contract with the union

On September 10, the Company received a letter dated September 9, from Local 155 Union President Carroll reiterating that Local 155 represented a majority of the employees and asking that negotiations begin (A. 357; 440, 441, 442). A subsequent letter was sent by Carroll to Giordano, dated September 11, stating that pursuant to their telephone conversation of September 9, in which Giordano had said he was willing to meet on September 18, 19, or 20, that Carroll preferred a negotiation session on Thursday, September 19 at 4:00 p.m. (A. 358; 443, 444, 445).

On September 12, Teamster Local 522 obtained authorization cards from eleven of the Company's employees and met with Giordano, who signed a recognition agreement with Teamsters Local 522 (A. 360; 8, 47, 222, 251-262, 417-419). On the following day, Giordano and Teamsters Local 522 representative reviewed a sample contract and then signed a handwritten memorandum of agreement on the contract terms which was later drafted into legal language and typed in final form and signed by Giordano on September 16, to be effective from September 13 (A. 360; 9, 47-49, 115, 222-223, 262, 419-434). After September 13, the Company deducted monies from its employees wages as a condition of their employment and paid the monies to Local 522 pursuant to the collective bargaining agreement with that union (A. 362; 119, 115, 116, 168, 397-399, 11-12, 419-429).

C. Balz and Raupp's discharges and their subsequent discriminatory treatment after being rehired.

As already noted supra, p. 5, Raupp was discharged on September 7. Within a few days, he was reinstated by the Company through the efforts of Union representative Lombardi. A few days later on either September 10 or 11, the Company reduced Raupp's rate of pay, eliminated other benefits, and also curtailed his work schedule (A. 363-364; 96-99, 10, 110-111, 112-113, 156-157, 163-164, 214-215).

On October 18, Local 522 sent a letter to the Company demanding the discharge of employees Raupp, Dennis Balz and Sal De Meo no later than October 21, unless they joined Local 522 and paid the requisite fees by that date (A. 362; 432, 400, 12, 42, 49, 50, 75, 76). According to Giordano,

he gave Raupp and Balz another opportunity to sign authorization cards for Local 522, but they, refused and Giordano fired them on October 18 (A. 362; 50, 75, 76, 118, 264).

On October 23, Giordano wrote a letter to Balz and Raupp asking them to report back to work on October 28 and 29, respectively, at the Company's Port Washington, Nassau County, location with their work and rate of pay to remain the same (A. 362; 438, 439, 52, 80-81, 78-79, 159-161). Both employees reported for work at that location on those dates, but were subsequently terminated on December 7, when they refused to apply for their salesmen licenses (A. 379, 362; 118-119, 69-71, 76-78, 96-97, 161). Neither Balz nor Raupp found the Port Washington location a convenient place to work. The Company offered them reinstatement there, rather than at the St. James, Suffolk County, location where they had previously worked, because the supporters of Teamsters Local 522 opposed their return to St. James and threatened to strike if they were rehired there (A. 379, 362; 159-160, 119).

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees; by threatening employees with job loss and more arduous working conditions, and by promising them unspecified benefits if they refrained from supporting Local 155 (A. 381-385, 362, 363-364, 369). The Board also found that the Company violated Section 8(a)(1) and (1) of the Act by the September 7 and October 18 discharges of employee Raupp and by the reduction

in his pay and benefits on and after September 11. The Board further found that Teamster Local 522 violated Section 8(b)(1)(A) and (2) of the Act by demanding the October 18 discharge of Raupp and Balz (A. 362, 263, 369).^{3/} Additionally, the Board found that the Company violated Section 8(a)(1), (2), (3) and (5) of the Act by refusing to recognize and bargain with Local 155 and by recognizing Teamster Local 522 as the collective bargaining representative of its employees when it did not represent a majority of those employees and thereafter entering into and enforcing a collective bargaining contract with that union (A. 379; 362-363, 369). In addition, the Board found that Teamster Local 522 violated Sections 8(b)(1)(A) and (2) of the Act by accepting recognition as the bargaining representative of the Company's employees and further by entering into and enforcing a collective bargaining agreement with the Company (A. 360-361, 362-363).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner, interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights (A. 369-370). The order also directs Teamsters Local 522 to cease and desist from the unfair labor practices it was found to have committed (A. 372). Affirmatively, the order requires the Company to recognize and bargain with Local 155, to void the collective bargaining agreement and reimburse all present and former employees after

^{3/} The Board concluded that the discharge of employee Thomas Clifford on October 1 did not violate the Act (A. 366, 367).

the execution of the illegal recognition agreement for monies paid by the employees or deducted from their earnings for initiation fees, dues assessments, or other obligations of membership in Teamster Local 522, plus interest; offer Raupp and Balz reinstatement at the St. James location where they initially were employed; and jointly and severally, with Teamsters Local 522, make them whole for any loss of earnings they may have suffered because of their October 18 discharge; ^{4/} and to post appropriate notices (A. 383, 384, 386, 370-371, 372).

4/ Teamsters Local 522 may terminate its liability for backpay to Balz and Raupp by giving the Company written notice that it has no objection to their reinstatement. Local 522 shall not thereafter be liable for any backpay accruing after 5 days from the giving of such notice. Absent such notification, Teamster Local 522, shall remain jointly and severally liable with the Company for all backpay to Balz and Raupp that may accrue until the Company offers them reinstatement (A. 380-381, n. 6).

The Company's obligation to reimburse Raupp for losses suffered because of the illegal reduction in his earnings on or about September 10 continues until Raupp's reinstatement as directed.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5), (3), (2), and (1) OF THE ACT BY DISCRIMINATING AGAINST SUPPORTERS OF LOCAL 155, BY RECOGNIZING, ENTERING INTO, AND ENFORCING A UNION SECURITY CONTRACT WITH TEAMSTERS LOCAL 522 AT A TIME WHEN IT DID NOT REPRESENT AN UNCOERCED MAJORITY, AND BY OTHER CONDUCT CALCULATED TO UNDERMINE LOCAL 155'S MAJORITY, AND THAT TEAMSTERS LOCAL 522 VIOLATED SECTION 8(b)(2) AND (1)(A) OF THE ACT BY ACCEPTING RECOGNITION AND ENFORCING ITS UNION SECURITY CONTRACT IN THESE CIRCUMSTANCES.

A. Introduction; the undisputed Section 8(a)(1) violations

As shown in the Statement, on September 7 the Company learned of Local 155's organizational campaign, and commencing that day Giordano, the Company's principal owner, responded by coercively interrogating employees regarding their union activities and desires; by suggesting that unspecified benefits were available if the employees abstained from unionization; and by threatening to discharge employees, to curtail the scope of his business, or to make working conditions more arduous if the employees persisted in union support. When several employees indicated that they still supported Local 155, Giordano threatened that he would "fix that" and that the union would never get in his shop.

Relying on undisputed testimony establishing that Giordano engaged in the foregoing conduct, the Administrative Law Judge found that the Company thereby violated Section 8(a)(1) of the Act (A. 369). The Company did not except to this finding before the Board, and in the pre-argument discussions mandated by this Court's rules, the Company stated that it does not intend to contest the Board's Section 8(a)(1) findings before this Court.

Accordingly, the Board's Section 8(a)(1) findings are not in dispute.

- B. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee William Raupp and then, after reinstating him, by reducing his pay, eliminating certain benefits, and curtailing work schedule

As shown in the Statement, pp. 4-6 , William Raupp was one of the chief organizers for Local 155. In addition, on September 7, Clifford had reminded Giordano that Raupp had sought out Giordano a number of times, seeking improved benefits for himself and the other employees. Later that same day, Giordano asked Raupp openly what the story was with his union. Raupp candidly admitted that he was bringing in a union because the employees were looking for better benefits and better salary. Raupp also openly revealed that he was the "inside organizer" who had spoken to most of the employees (A. 106). After a further exchange, Giordano told Raupp that he was fired. He also advised Raupp that he was terminating arrangements for Raupp to attend a local university for advanced training at the Company's expense. Giordano further indicated that he would probably have Raupp blacklisted in the exterminating industry. Finally, Giordano told Raupp that he could have his job back if he would clear up the union activity.

The testimony concerning Giordano's statements to Raupp on the occasion of his discharge was undisputed (A. 354). As the Fifth Circuit has stated, in similar circumstances, "the effect of this evidence was an admission. . . . If [a responsible official] said what was said he said

it was in this context, an outright confession of unlawful discrimination."

N.L.R.B. v. L. C. Ferguson, 257 F. 2d 88, 92 (C.A. 5, 1958). Accord:

N.L.R.B. v. John Langenbacher Co., 398 F. 2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049. Further, the Company filed no exceptions to the Administrative Law Judge's finding that the discharge of Raupp was discriminatory. Accordingly, the Company is not free to contest this finding before this Court. See N.L.R.B. v. Ochoa Fertilizer Corp., 368 U.S. 318, 322 (1961); N.L.R.B. v. Park Edge Sheridan Meats, Inc., 323 F. 2d 956, 959 (C.A. 2, 1963).

Following his discharge, Raupp sought the aid of Local 155 representative Lombardi, and Lombardi undertook to talk to Giordano on his behalf. As a result, Raupp was permitted to return to work on the next business day following his discharge. However, within a day or two after his return, his work schedule was curtailed and his pay was reduced. Further, the Company ended an arrangement under which Raupp was permitted to use a company-owned vehicle almost 90 percent of the time and under which he received full reimbursement for gasoline and repairs on those occasions when he used his own car.

Before the Board, the Company sought to justify these adverse changes on the ground that the Company's busy season was ending and hence it no longer needed Raupp to work in the manner that he had worked previously. However, Raupp specifically denied that Giordano attributed the cut-back in his hours to the end of the busy season (A. 157), and the Administrative Law Judge credited Raupp's testimony that he had been given extra work

previously, not because of the Company's busy season, but because one of the servicemen had quit and Raupp had taken over part of his route (A. 364; 158, 156). Further, although Giordano also claimed that Raupp desired a change in his hours, the Administrative Law Judge credited Raupp's testimony that at the time the changes were announced, Raupp stated to Giordano that he could not understand the cut-back because "I was doing my work even though I was involved with the union activity" (A. 364; 112).

Where, as here, the reasons given for an employer's action are not credible, the Board can reasonably infer that some other reason motivated the employer's action. "More than that," the Board can infer "that the [real] motive is one that the employer desires to conceal -- an unlawful motive -- at least where, as in this case, the surrounding facts tend to reinforce that inference." Shattuck Denn Mining Corp. v. N.L.R.B., 362 F. 2d 466, 470 (C.A. 9, 1966).

Here, in view of the timing of the cut-back, following closely upon Giordano's September 7 discharge of Raupp because of his union activities, and in view of Giordano's prior threats to retaliate against union supporters, the Board inferred that the real reason for Giordano's action was to penalize Raupp for his union support. This inference is reasonable and should be affirmed. Cf. N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405 (1962); N.L.R.B. v. Dorn's Transportation Co., 405 F. 2d 706, 712 (C.A. 2, 1969).

- C. The Board reasonably concluded that Local 155 represented a majority of the bargaining unit employees at the time it requested the Company to bargain

As indicated in the Statement, pp. 3-4, Local 155 commenced organizational campaign on September 4 and over the next several days obtained authorization cards from nine of the fifteen employees whom the Board found were properly within the bargaining unit.^{5/} Accordingly, the Board found that Local 155 represented a majority of the employees at the time it requested the Company to bargain on September 9 and 10. Before the Board the Company and Teamster Local 522 attacked this finding on two separate grounds. First, they contested the validity of three of the cards -- namely those signed by employees Tierney, Minter, and Page. Second, they contended that the unit should include three additional employees who did not sign cards for Local 155 -- namely, Baudo, Mark Giordano, and Joseph Giordano. The issues raised by these contentions are relevant both to the Board's finding that the Company was obliged to bargain with Local 155 as of September 9 and to the Board's finding that the Company improperly extended recognition

^{5/} The record shows that the following nine employees signed cards for Local 155 on the dates listed below(A. 414):

<u>Name</u>	<u>Date Signed</u>
Anthony Nuzzi	9-4-74
Michael J. Passantino, Jr.	9-4-74
William C. Raupp	9-5-74
Ronald Page	9-5-74
Thomas Clifford	9-5-74
Salvatore De Meo	9-6-74

(continued)

to Teamsters Local 522. We show below that the Board properly resolved these issues.

1. The Board reasonably concluded that the cards signed by Tierney, Minter, and Page were valid

Tierney -- The attack on the validity of Tierney's card is basically an attack on the Administrative Law Judge's credibility resolutions. At the hearing, Tierney disavowed the card shown him and testified that although the signature on the card resembled his, it was not his signature (A. 355; 232). He attempted to explain this situation by testifying that he had merely gone to the September 8 union meeting for a free meal and had had several beers before the meeting. He claimed that he returned the card without signing it. The Administrative Law Judge, however, credited Lombardi's testimony that he saw Tierney sign and date the card and recalled that Tierney returned the card to him, and further that he discussed the possible benefits of unionism with Tierney at that time. In discrediting Tierney's testimony, the Administrative Law Judge noted that Tierney left the Company shortly after these events, but sought reemployment a few weeks prior to the hearing herein (A. 7; 233). However, he was

<u>5/</u>	<u>Name</u>	<u>Date Signed</u>
	Mark Minter	9-6-74
	Dennis Balz	9-7-74
	Patrick Tierney	9-8-74

not rehired and was advised by Giordano that many people had been laid off and if things picked up the Company might be able to hire him (A. 355; 233, 234-235, 238). In this context, the Board reasonably determined that Tierney's testimony seemed to be colored by a desire "to curry favor" with the Company in hopes of being rehired (A. 356). In addition, the Board noted that the initials of Earnest Lombardi appear on the card attesting to the validity of Tierney's signature. Thus, the Administrative Law Judge had ample cause for discrediting Tierney and accepting Lombardi's testimony that the card was validly signed.^{6/}

Minter -- Likewise, the dispute over the validity of Minter's card merely raises an issue of credibility which was resolved adversely to the Company and Teamster Local 522 and therefore the Board's findings in this regard ought not to be disturbed. See n. 6, supra. Thus, after carefully analyzing the conflicting testimony and examining the pertinent documents, the Administrative Law Judge rejected the Company's contention that Minter submitted a letter of resignation on August 27 (A. 358-359). Rather he found that although Minter was looking for other work, he intended to remain an employee unless he could find a better job. Minter signed a card on September 5, and he did not learn that a job which he wanted had come through until after Local 155 had

^{6/} It is, of course, well settled that "questions of credibility are for the trier of fact" and ought not ordinarily be overturned by the Court. N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1975).

requested recognition on September 9. The Administrative Law Judge credited his testimony that he did not offer his resignation until later in the day on September 9 (A. 359-360). Since Minter was an employee at the time of the demand for recognition, he was entitled to have his card counted. Cf. N.L.R.B. v. General Tube Company, 331 F. 2d 751, 751-753 (C.A. 6, 1964).

Page -- As for Page, the Company and Teamsters Local 522 argued that the authorization card for Local 155 executed by him on September 5 should not be counted as evidence of Local 155's majority since he subsequently executed a card for Teamster Local 522. There are situations where an employee signs authorization cards for each of two unions and the card of neither union will be regarded as a valid designation. The reasoning prompting such circumstances is that it is impossible to determine which union the employee is designating as his exclusive representative.^{7/}

Here, by contrast, Page executed a card designating Local 155 as his bargaining representative on September 5 -- prior to the Company's learning of the union activity and its responding by, among other things, discharging Raupp. He did not sign a card for Teamsters Local 522 until September 12 -- after the Company had retaliated against Raupp and engaged in other conduct calculated to undermine support for Local 155.

^{7/} E.g., Hi-Temp, 203 NLRB 753, 756-757 (1973), enforced, 513 F. 2d 586-587 (C.A. 7, 1974); Intalco Aluminum Corporation, 169 NLRB 1034, 1037-1038 (1968), enforced in pertinent part, 417 F. 2d 36, 40, 43 (C.A. 9, 1969); Allied Supermarkets, Inc. -- Allied Discount Foods Division, 169 NLRB 927, and cases cited at n. 3 (1968).

In these circumstances, it is reasonable to attribute Page's change of heart to the Company's unfair labor practices.^{8/} Accordingly, the Board properly dismissed the Company's attack on Page's card as mere "bootstrapping" (A. 360). Since Page had not revoked his card at the time of Local 155's demand for recognition and since his subsequent revocation was tainted by the intervening misconduct, the Board properly counted his card.

2. The Board properly found that Baudo, Mark Giordano, and Joseph Giordano were not properly includible in the bargaining unit

Baudo -- Contrary to the Company's and Teamster Local 522's argument, the record amply supports the Board's decision to exclude Baudo from the unit. Thus, it is undisputed that Baudo was a full-time New York City policeman who merely worked for the Company on an irregular basis (A. 4; 306-307, 309). Because of his police duties, he had not worked for the Company in 1974 until September 11, after Local 155's recognition request (A. 352; 243, 300). When employed his duties were mainly on a "fill in" basis (A. 352; 307). As an irregular part time employee, not working at all in 1974 until mid-September, Baudo could not be considered as proper member of the unit for he lacks the requisite community of interest with the other employees. And the Board, therefore, reasonably excluded him from the unit (A. 4).^{9/}

^{8/} Of the various Local 155 supporters, Page alone appears to have failed to attend the union meeting which following Raupp's discharge (A. 23-24).

^{9/} Cf. N.L.R.B. v. Groh and Sons, 329 F. 2d 265, 268 (C.A. 10, 1964); Farmers Insurance Group, 143 NLRB 240, 244-245 (1963).

Mark and Joseph Giordano -- The Board also acted reasonably in rejecting the contention that Mark and Joseph Giordano should be included in the bargaining unit. The record shows that Mark and Joseph, ages 15 and 17 years old, respectively, are Giordano's sons. They both attend school and work Saturdays, school holidays, and on other occasions when directed to do so by their father. They clean offices, trucks, and do other odd jobs (A. 351-352; 40-41, 309-310). Plainly, their relationship to the Company is quite different from that of the service-men and as minor children of the two owners of the Company "their presence in the unit would interfere with the 'fullest freedom' of the other employees" See N.L.R.B. v. Caravelle Wood Products, Inc., 504 F. 2d 1181, 1187 (C.A. 7, 1974). Accordingly, the Board reasonably concluded that Mark and Joseph "have no community of interest with the other employees and must be excluded" (A. 352).

- D. The Board properly concluded that Teamster's Local 522 did not represent an uncoerced majority of the bargaining unit at the time that the Company recognized it and entered into a union security contract

As shown in the Statement, on September 12, three days after Local 155 sought recognition on the basis of its card majority, the Company recognized and entered into a union security contract with Teamsters Local 522. Before the Board, it was contended that that action was proper because Teamsters Local 522 submitted eleven authorization cards to the Company on September 12. Since by the Administrative Law Judge's computation the bargaining unit on that date consisted of 14

employees (A. 361), it was argued that Teamsters Local 522 had a clear majority. And even if the union were comprised of 17 or 18 employees, as the Company and Teamsters Local 522 contended, the Teamsters still had a majority.

This argument suffers from a fatal flaw: included in the eleven cards are cards signed by Page, Baudo, Mark Giordano, and Joseph Giordano. As just shown supra however, Page had previously signed a valid card for Local 155 and his change of heart is properly attributable to the Company's unfair labor practices. And Baudo and the two Giordanos are properly excludible from the unit because they lack the requisite community of interest. Accordingly, Teamsters Local 522 had at most seven valid cards at the time of recognition -- less than a majority in the unit of 14 employees. Thus, without even considering the extent to which the seven cards were themselves tainted by the Company's unfair labor practices, the recognition of Teamster's Local 522 was improper.

- E. The Board properly found that the Company violated Section 8(a)(1), (2) and (3) of the Act by recognizing Teamsters Local 522 and by entering into and enforcing a union security contract with it and that Teamsters Local 522 violated Section 8(b)(2) and (1)(A) by accepting such recognition and entering into and enforcing the contract

By granting and accepting recognition of Teamster Local 522, when Local 522 did not represent a majority-- much less an uncoerced majority-- the Company violated Section 8(a)(2) and (1) of the Act, and Teamster Local 522 violated Section 8(b)(1)(A). And, by entering into and enforcing the collective bargaining agreement of September 16, the Company violated Section 8(a)(3) of the Act and the Teamsters Local 522 violated Section 8(b)(2). See International Ladies Garment Workers Union (Bernhard-Altman Texas Corp.) v. N.L.R.B., 366 U.S. 731, 738-739 (1961); Amalgamated Local Union 355 v. N.L.R.B., 481 F. 2d 996, 1005-1006 (C.A. 2, 1973); Sheraton-Kauai Corp. v. N.L.R.B., 429 F. 2d 1352, 1354 (C.A. 9, 1970); Empire State Sugar Company v. N.L.R.B., 401 F. 2d 559, 560-561 (C.A. 2, 1968).

Furthermore, because the contract between Teamster Local 522 and the Company was not lawful, any actions taken pursuant to this contract are likewise unlawful and invalid. The record shows, supra, p. 8, that on October 18, Local 522's secretary-treasurer wrote to the Company demanding that three employees Raupp, Balz and De Meo be terminated no later than October 21, unless they had joined Local 522 and paid the requisite amounts required by the contract by that date. At the hearing, Giordano admitted that he gave Raupp and Balz another opportunity to sign authorization cards for Local 522, but they refused and he dismissed them, on October 18 pursuant to Teamster Local 522's direction (A. 362; 264).

Accordingly, the October 18 discharges of Raupp and Balz pursuant to the contract and the attempt to discharge De Meo^{10/} under the contract are all in violation of Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the Act. Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 40 (1954); Local 1104, Communication Workers of America v. N.L.R.B., 520 F. 2d 411, 416-420 (C.A. 2, 1975), cert. denied, U.S. , 96 Sup. Ct. 778 (1976). And, see cases, supra p. 22.

Finally, it is undisputed that the Company requested that Balz report back to work on October 28, and Raupp the following day, October 29, both at the Company's other location in Port Washington and the employees did so. However, it is undisputed that Balz and Raupp felt that the Port Washington location was less convenient than at St. James, where they formerly worked, mainly because of increased commuting time, increased work route and distance from the principal facility at St. James (A. 52, 57-61, 65-69, 78-79, 80-81, 96-97, 160-161).

Before the Board, the Company contended that it rehired Balz and Raupp at Port Washington rather than at St. James in order to avoid violent discord between Balz and Raupp, and Teamster Local 522 adherents, or a possible strike of Teamster Local 522 supporters. But, as the Board noted (A. 3, n. 5), such action ignores the Company's duty to "resist the pressures it yielded to." See N.L.R.B. v. Acland, Inc., 466 F. 2d 588 (C.A. 5, 1972) and cases cited therein.

^{10/} De Meo apparently was not discharged because he joined Local 522 and paid the requisite monies (A. 264).

F. The Board properly found that the Comany violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 155 at a time when it had embarked on a clear course of misconduct which prevented, the Board's bargaining order is therefore proper

1. Applicable principles

It has been settled since N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), that the Board has remedial authority to issue a bargaining order where unfair labor practices have been committed "that interfere with the election." Id. at 594. The Court indicated that a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view of their tendency to undermine the Union's majority support and the likelihood of their recurrence in the future, "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." Id. at 614. Furthermore, the Court emphasized, "it is for the Board and not for the Court's . . . to make that determination [whether the effects of the employer's unfair labor practices can be erased without issuance of a bargaining order], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." Id. at 612 n. 32. Accord, M.P.C. Restaurant Corp. v. N.L.R.B., 481

F. 2d 75, 79 (C.A. 2, 1973); N.L.R.B. v. International Metal Specialities, Inc., 433 F. 2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907.

("Appellant's attack on the use of a bargaining order must fail, moreover, in light of the Supreme Court's decision in [Gissel], entrusting to the Board almost total discretion to determine when a bargaining order is appropriate.")

Interpreting and implementing Gissel, the Board held in The Trading Port, Inc., 219 NLRB 298, 300-301 (1975), that the obligation to bargain devolves on the employer no earlier than the time when he embarks on a course of conduct which renders a fair election unlikely and tends to undermine the Union's majority status; at that point the employer has forfeited his right to insist on an election and can no longer refuse to bargain with the Union which the majority of the employees have designated as their representative by signing authorization cards. In Trading Port, where the employer commenced his course of misconduct a few days before the union's recognitional demand, the Board fixed the date of the employer's bargaining obligation as of the date of the union's recognitional demand (Id. at 301). See also Ann Lee Sportswear, Inc. v. N.L.R.B., 545 F. 2d 739, 744 (C.A. 10, 1976), approving the Board's Trading Port policy.

2. The Board properly found that the Company was obliged to bargain with Local 155 as of September 9

In the present case the Company embarked on a clear course of coercive misconduct immediately upon learning of Local 155's organizational

drive. Thus, as shown, on September 7, Giordano interrogated his employees William Raupp and Thomas Clifford, and he likewise interrogated four or five other employees on September 9, concerning their membership in and activities and sympathies for Local 155. Giordano warned and directed his employees to refrain from joining and assisting Local 155 on September 7 and 9. On September 7, Giordano discharged Raupp, threatened his employees with discharge, threatened to discontinue his business operations, and offered and promised benefits in working conditions in order to suppress his employees activities in behalf of Local 155. Giordano further threatened to impose more arduous and onerous working conditions upon his employees because of their membership in and support for Local 155. After reinstating Raupp on September 9, Giordano reduced his rate of pay and other benefits and provided him with reduced employment because of his support of Local 155. Then, on September 12, having previously warned the employees that he would "fix" it that Local 155 would never come in, Giordano precipitately recognized and entered into a union security contract with Teamsters Local 522 -- thereby locking the employees into a relationship with a minority union.

Particularly in a "small, closely-knit unit" (N.L.R.B. v. Scoler's Inc., 466 F. 2d 1289, 1293 (C.A. 2, 1972)), the Board acted reasonably in concluding that when an employer makes this kind of coercive response to its employees attempt to organize, such misconduct is unerringly characterized as "egregious" and serious and its impact is lingering (A. 367). Accordingly, the Board's issuance of a bargaining order was a proper exercise of its discretion and was well within the limits previously approved by this Court. Compare, N.L.R.B. v. Scoler's Inc., supra, 466 F. 2d at 1292-1294, enforcing, 192 NLRB 248 (1971) (where, in a unit of some 18 employees, the Board concluded that the Company's coercive interrogation, threats to punish union adherents, and to reward union opponents -- all directed at six of the employees -- were sufficiently widespread to make a fair election impossible). And since the Company had embarked upon a clear course of misconduct as of the time of Local 155's recognitional demand, on September 9, the Board reasonably fixed the commencement of its bargaining obligation as of that date.

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

JOHN H. FERGUSON,
MORTON NAMROW,

Attorneys,

National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

March 1977.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SCIENTIFIC PEST CONTROL CORPORATION;
LOCAL 522, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Respondents.

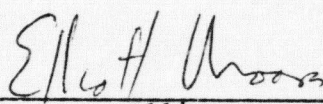
No. 77-4001

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's
brief, in the above-captioned case, ^{have} ~~has~~ this day been served upon the
following counsel at the addresses listed below:

Richard Greenspan, Esquire
Charles Katz, Esquire
360 Lexington Avenue
New York, New York 10017

Leonard Kimmell, Esquire
Kimmell & Kimmell
150 Broad Hollow
Mellville, New York 11746


Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board

Dated at Washington, D.C.

this 15th day of March, 1977.